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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GEORGE PAIGE, Defendant and Appellant.	B155842 (Los Angeles County Super. Ct. No. BA215721)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marsha N. Revel, Judge. Affirmed.

William Flenniken, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted George Paige of attempted robbery, with a finding he personally used a deadly and dangerous weapon, and assault with a deadly weapon. (Pen. Code, §§ 211, 664; 12022, subd. (b)(1); 245, subd. (a)(1).) In bifurcated proceedings, Paige admitted he had a prior serious felony conviction, had served two prior prison terms, and had three prior felony convictions within the meaning of the "Three Strikes" law. (Pen. Code, §§ 667, subd. (a)(1); 667.5, subd. (b); 667, subds. (b)-(i); 1170.12.) He was sentenced to an aggregate term of 31 years to life. On appeal, Paige contends: (1) the trial court committed reversible error by refusing to appoint new counsel to represent him; (2) the mandatory parole eligibility provision in the Three Strikes law constitutes cruel and unusual punishment; and (3) the Three Strikes law on its face and as applied constitutes cruel and unusual punishment.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Around 9:00 p.m. Sandra Avalos was in her store with her brother Julio. Appellant entered, said he wanted to buy a soda, and presented 15 cents. Sandra Avalos replied the money was not enough for a soda. Appellant then requested a bottle of water as a "gift" and Sandra Avalos refused. Appellant asked her for a glass of water and Sandra Avalos told Julio to give it to him.

When Julio left to retrieve the water, appellant pulled out a pocket knife, grabbed Sandra Avalos by her hair, pulled her towards him, and demanded money from the cash

[1] Appellant also contends the trial court committed reversible error by instructing the jury with CALJIC No. 17.41.1, the "anti-nullification" instruction. The contention that this instruction deprives a defendant of the right to a fair trial and to due process of law was rejected in *People v. Engelman* (2002) 28 Cal.4th 436, in which the Supreme Court held CALJIC No. 17.41.1 does not infringe upon a defendant's federal or state constitutional right to trial by jury or state constitutional right to a unanimous verdict.

register. After two attempts, appellant stabbed Sandra Avalos in the neck. Sandra Avalos grabbed a nearby "machete" and appellant threw her on the ground and fled.

Julio ran out the front door after appellant. Sandra Avalos's husband called police and then drove down the street until he saw Julio running. After they spoke, the husband continued driving. He saw appellant hiding behind a truck. After a physical altercation, the husband and Julio were able to subdue appellant and return him to Sandra Avalos's store.

Police arrived at the store. One officer believed he was responding to a domestic violence call based on the police broadcast. He asked appellant if Sandra Avalos was his wife. Appellant responded: "No. That's the lady I was trying to rob." Sandra Avalos identified appellant at the scene as the man who attacked her.

Appellant did not testify in his defense.

The jury convicted appellant of attempted second degree robbery with a finding he personally used a knife, and assault with a deadly weapon against Sandra Avalos Appellant admitted a prior serious felony conviction and two separate prison terms as enhancements, and three prior felony convictions within the meaning of the Three Strikes law. The trial court sentenced him to a total term of 31 years to life, consisting of 25 years to life for attempted robbery, a consecutive one-year term for the weapons use enhancement, a consecutive five-year term for the serious felony enhancement. The court stayed appellant's 25 to life sentence for the aggravated assault pursuant to Penal Code section 654, and struck the two separate prison term enhancements in the interests of justice.

DISCUSSION

Appellant's Request for Substitution of Appointed Counsel

During a *Marsden*[2] hearing before trial, appellant expressed several reasons why he was dissatisfied with his attorney. Pertinent to this appeal was his concern that defense counsel was not investigating a potential defense theory. Appellant represented to the court that he suffered "several years" from "a psychiatric problem" for which he was taking two prescribed medications at the time of his arrest. Appellant suggested that he "could have been allergic to one [of the medications]" or that the mixture of the two medications could have caused an adverse reaction, and there was "a great possibility that because of the medications why I don't remember what happened at the time. Because I suffer from paranoia schizophrenia and I've very, umm, hallucinogenic which I see things and hear things." Appellant complained that defense counsel failed to contact "a psychiatrist" to learn of any mental impairment from taking the combined medications.

In reply, defense counsel indicated that he had a court appointed expert, Dr. Adrienne Davis (Dr. Davis), examine appellant to determine whether "there was any mental defense available to the underlying charge." When she opined there were none, defense counsel decided to pursue an alternative defense, notwithstanding appellant's insistence to the contrary. Defense counsel told the court he advised appellant that a mental defense was "a waste of time" and that he was not going to request another court appointed expert.

In response, appellant represented to the court that Dr. Davis had confirmed appellant "definitely" had a "psychiatric problem" but she concluded it was unrelated to his crimes. Appellant stated he was uncertain about Dr. Davis's expertise and questioned whether she "even know[s] about how . . . psychiatric medication works."

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[2] *People v. Marden* (1970) 2 Cal.3d 118.

In denying the *Marsden* motion, the trial court told appellant: "I know that you haven't gotten along with [defense counsel] from the beginning, apparently according to your letter. But that's not a reason for me to give you another lawyer if he's doing everything that he's supposed to be doing. And apparently he is. [¶] He had the doctor appointed. [¶] . . . [¶] If the doctor who saw you had written a different report, that might be a different situation, but it's not."

Appellant contends the denial of his *Marsden* motion was an abuse of discretion. He argues that defense counsel's failure to investigate the possibility of appellant's mental impairment from the medications deprived him of an "involuntary intoxication" defense to one or both charged offenses. We disagree.

A defendant is entitled to substitution of counsel if the record clearly shows the appointed attorney is not providing adequate representation or the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation will likely result. (*People v. Welch* (1999) 20 Cal.4th 701, 728.) Denial of a *Marsden* motion is not an abuse of discretion unless the defendant shows that a failure to replace the appointed attorney would "substantially impair" his or her right to assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

Appellant did not make the requisite showing in his motion. Contrary to appellant's claim, the trial court was not compelled to conclude from defense counsel's comments that he failed to contemplate the mental defense of an adverse drug reaction. Appellant is correct that defense counsel did not explicitly tell the court he had investigated and discounted this particular theory. However, his reply to appellant's concern cannot be characterized as "non-responsive." Defense counsel explained to the court he had asked Dr. Davis "to determine whether there was any mental defense available to the underlying charge. And she categorically said to me ['N]o.[']" A fair reading of these statements is that defense counsel had Dr. Davis consider the viability of a mental defense on any theory, including an adverse drug reaction and she did so without success.

Moreover, because appellant apparently insisted his attorney pursue a mental defense anyway, it cannot be inferred that defense counsel was unaware of or ignored appellant's preferred theory. As is borne out by the trial court's remarks, appellant's dissatisfaction with his attorney's choice of defense, conjoined with his other criticisms of defense counsel, more likely reflected a lack of trust or a disagreement over trial tactics, neither of which is sufficient to relieve appointed counsel. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 822-823; *People v. Welch, supra,* 20 Cal.4th at pp. 728-729.)

Appellant's assertions are correct that the record does not contain Dr. Davis' background, the parameters of her investigation, or the information upon which she relied in rendering her opinion. However, these omissions do not help appellant's claim his counsel should have been discharged. Indeed, neither the expert's qualifications nor the contents of her report are part of the record. Appellant would have us speculate as to both to find the trial court abused its discretion. We decline to do so.

The record fails to clearly show a lack of adequate representation or a substantial impairment of appellant's right to assistance of counsel. We find no abuse of discretion.

Appellant's Claims of Cruel and Unusual Punishment

Appellant makes two related contentions of cruel and unusual punishment. He attacks the mandatory parole ineligibility provision of the Three Strikes law and claims the Three Strikes law is unconstitutional on its face and as applied. We disagree.

Appellant's criminal record dates back to 1979, when he was convicted of forgery and received 12 months summary probation on condition he serve 30 days in county jail. In 1982 he was convicted of assault with a deadly weapon, robbery and oral copulation with a child under the age of 14 years and was sentenced to nine years in state prison. While in prison in 1983, appellant was charged and convicted of possessing a dangerous weapon and received 16 months in state prison. In 1988 he was convicted of second degree burglary and was sentenced to two years in state prison. In 1993 he was convicted of robbery with the use of a weapon and sentenced to a concurrent term of eight years. In

1999 he was convicted of failing to register as a sex offender. Appellant's probation report shows numerous parole violations and a history of "violent behavior" in prison.

Courts consistently have rejected claims that the punishment required by the Three Strikes law violates the bans on cruel and unusual punishment. (*Ewing v. California* (2003) ___ U.S. ___, 123 S.Ct. 1179; *Lockyer v. Andrade* (2003) ___ U.S. ___, 123 S.Ct. 1166; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965; *Rummel v. Estelle* (1980) 445 U.S. 263, 284; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.) We decline to rule otherwise. Nothing in appellant's individual circumstances justifies a reduction of his term of imprisonment or shows his punishment was disproportionate. (See *People v. Dillon* (1983) 34 Cal.3d 441.) Appellant's sentence was appropriate in light of his current crime, violent recidivist behavior, and lack of regard for rehabilitation.

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur.

PERLUSS, P.J.

JOHNSON, J.